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IN THE

Supreme Court of the United States

No. 130

OCTOBER TERM, 1958

SAUNDERS P. LEMON,

Petitioner,

v.

HONORABLE JOHN H. DRUFFEL, Judge of the United States District Court for the Southern District of Ohio, Western Division,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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REASONS WHY WRIT OF CERTIORARI SHOULD BE DENIED

Under the rules of this Court a review on Writ of Certiorari will not be granted unless there are special and important reasons therefor. *Revised Rules of the Supreme Court of the United States, 1954* [Part V, Rule 19(1)].

Petitioner in his Brief has advanced no other reason for a review of this case than to complain that the lower courts herein have "extended by misconception and misapplication" the doctrine recently set forth by this Court in the case of *Norwood* v. *Kirkpatrick*, 349 U. S. 29, and to further

complain that said Courts below are guilty of an abuse of discretion which should be corrected by mandamus.

Respondent submits that the reason so advanced by Petitioner is nothing more than a prayer for a redetermination of the issues already spelled out by this Court in the *Norwood* case and, therefore, insufficient to cause this Court to grant a Writ of Certiorari herein.

I. THERE WAS NO ABUSE OF DISCRETION BY THE DISTRICT COURT IN DENYING MOTION TO TRANSFER

Petitioner goes into some detail in his Brief to cite cases in which the Courts have interpreted Section 1404(a) of the Judicial Code [28 U. S. C. 1404(a)]. It should be noted that the great bulk of these decisions were handed down before the decision of this Court in *Norwood v. Kirkpatrick*, supra.

A. Plaintiff's Choice of Forum

Both before and since the decision of this Court in the *Norwood* case the privilege of a plaintiff to choose his forum under Section 6 of the Federal Employers' Liability Act was a factor, but only one factor in the lower Court's determination of the propriety of transferring an action from one district to another under Section 1404(a). *Ex Parte Collet*, 337 U. S. 55.

In the *Norwood* case one of the plaintiffs in the action, which had been brought in Philadelphia, Pennsylvania, was a resident of the City of Philadelphia and two others were residents of Washington, D. C. Nevertheless, on motion, the District Court transferred the cause to South Carolina—a great distance from the residence of any of the plaintiffs. In the case at Bar the plaintiff also was a resident of the district from which the case was transferred, but the distance from his residence was a mere eight miles

as contrasted to the hundreds of miles involved in the *Norwood* case.

It is hard to conceive of this plaintiff being put to a great hardship in prosecuting his action a mere eight (8) miles from his residence (See Appendix A, p. 17, Petitioner's Brief) when the court in the *Norwood* case didn't consider hundreds of miles from residence as a sufficient hardship in prosecuting that action to require denial of the motion.

B. Distances Involved

Petitioner claims that the distances involved in a transfer from Cincinnati, Ohio to Cattlettsburg, Kentucky [around one hundred fifty (150) miles] are not great. Here again the distances involved are merely single factors to be considered by the Court in arriving at its decision on a motion to transfer under Section 1404(a). Respondent can find no decision under this section where distance involved was the sole factor governing the Court's decision.

Just a few cases where motions to transfer were granted and where the distances involved were comparable to those in the case at Bar are:

Maloney v. *N. Y. H. and H. R. Co.* (1949), D. C. N. Y. 88 F. Supp. 568;

Benrus Watch Co. v. *Bulova Watch Co.* (1954), D. C. R. I. 126 F. Supp. 470;

Tuck v. *Pa. Rwy.* (1954), D. C. E. C. Pa. 122 F. Supp. 527;

Banachowski v. *Atlantic Rwy. Co.* (1949), D. C. N. Y. 84 F. Supp. 444.

C. Failure to Identify Witnesses

Petitioner claims that the failure of the Railway in its affidavit to name witnesses to be called and the nature of the testimony to be offered in the District Court in support

of the motion to transfer made said affidavit fatally defective.

In the three cases cited by Petitioner the District Court did overrule the respective motions to transfer and did cite failure to list names and the specific nature of testimony as one reason for denying the motion.

A reading of many District Court opinions, however, indicates that sometimes these motions are argued without affidavits, and even where affidavits are submitted the specific naming of witnesses with their anticipated testimony may or may not be required, as the District Judge pleases.

White v. *Employers Liability Assurance Corp.* (1949), U. S. D. C., E. D. So. Car. 86 F. Supp. 910;
Cinema Amusements v. *Loew's, Inc.* (1949), U. S. D. C., D. Del. 85 F. Supp. 319.

The affidavit which Petitioner herein attacks gives the approximate number of witnesses, their residence and the distances involved. It should be noted that neither Petitioner nor the District Court made a request for a more definite list at any time, or at any prior consideration of the question involved.

Even before this Court's decision in the *Norwood* case the failure to be as specific in an affidavit as Petitioner would desire could not be deemed more than a factor in the lower Court's decision on a motion to transfer.

D. Testimony of Medical Witnesses

Petitioner claims that two (2) doctors whom Petitioner desires to call as witnesses reside in the district from which the case at Bar was transferred and that for this reason alone the transfer should have been denied.

In almost every case involving a transfer from one district to another one party is faced with the difficulty of

having some witnesses at the trial if the trial is held a different place than the party asks. It has been said, however, that medical testimony suffers less when transcribed in a deposition and read at the trial than does liability testimony.

Nicol v. *Koscinski*, C. A. 6, 1951, 188 F. 2d 537;
Harwich v. *Atlantic Coast Line* (1955), D. C. Mass. 129 F. Supp. 558.

These factors, as this Court can observe from the record herein, were all presented to the District Court and must be presumed to have been considered in the decision of said Court.

E. Delay in Filing Motion

Petitioner claims that the filing of the motion to transfer six (6) months after the filing of Petitioner's Complaint is itself grounds for denial of the motion and he cites a number of District Court decisions in support thereof. Delay in filing is merely one of the factors bearing on possible hardship to either party and no hard and fast rule has been formulated as to when there has been unreasonable delay in filing such a motion. In the case of *Molloy* v. *Bemis Bros. Bag Co.*, D. C. N. Y. (1955), 130 F. Supp. 265, a motion to transfer was filed almost three (3) years after Petitioner's Complaint and in *Harwich* v. *Atlantic Coast Line*, supra, the period was over six (6) months. In both of these cases, and in many others where transfers have been granted the Courts have merely taken the time of filing the motion into consideration and weighed it along with other relevant factors.

F. Prior Decision of Transferee Court

Petitioner further states that the railway company was estopped to litigate the issues on the motion to transfer

due to the fact that the District Transferee Court had some time previously granted Petitioner's motion to dismiss without prejudice a similar action originally brought by Petitioner in said Transferee Court.

Respondent, however, wishes to point out that the ruling by the Transferee Court was on motion by Petitioner to dismiss only and it was not a decision rendered on a motion to transfer under Section 1404(a). There was no issue involved as to the balance of conveniences between the forum and any particular District Court for the prosecution of the particular cause of action brought by Petitioner.

This being so, it does not appear that the identical issues were involved in the respective hearings before the respective District Judges, and, therefore, the rule of collateral estoppel would not apply to prevent the railway company from seeking and obtaining an order of transfer.

De Sollar v. *Hanscome,* 158 U. S. 216;
Kelliher v. *Stone and Webster, Inc.,* C. A. 5th, 75 F. 2d 331.

II. THE COURT OF APPEALS COMMITTED NO ERROR IN REFUSING TO ISSUE A WRIT OF MANDAMUS

Petitioner claims that the Circuit Court of Appeals should have exercised its power to issue a Writ of Mandamus to compel the District Court to nullify its transfer order. The first question raised by Petitioner is the authority of the Court of Appeals to issue such a Writ to review a District Court's decision under Section 1404(a).

The Circuit Court of Appeals in reviewing the case at Bar found that it had such power to review by mandamus proceedings. *Nicol* v. *Koscinski,* supra. Respondent has no quarrel with this decision of the Court of Appeals and wishes to take no issue therewith. A Writ of Mandamus

is a drastic order which should only be used under exceptional circumstances, as this Court has often pointed out.

Bankers Life and Casualty Co. v. *Holland,* 346 U. S. 379;
Ex Parte Fahey, 332 U. S. 258.

The Court of Appeals, after deciding that it had such power, held that the case at Bar was not one in which such power should be exercised.

Under the decision of *Norwood* v. *Kirkpatrick,* supra, there is now a broader discretion allowed the District Judge than formerly where the lower court was required to test each order by the rule of *forum non conveniens.*

Gulf Oil Corp v. *Gilbert,* 330 U. S. 501;
Ford Motor Co. v. *Ryan,* 182 F. 2d 329.

This Court noted in the *Norwood* case that Section 1404(a) now eliminates the hardship of a dismissal of plaintiff's action, and, while the relevant factors are the same, the lower court may transfer on a lesser showing of inconvenience than previously.

In the *Norwood* case this Court did not find it necessary to decide whether the Court of Appeals had the power to issue a Writ of Mandamus in such matters and this Respondent submits that the case at Bar presents the same situation.

CONCLUSION

There is nothing in the record before this Court to justify Petitioner's contention that he has been the victim of "unrestricted discretion without review" as he infers in the conclusion of his Brief. (See p. 15, Petitioner's Brief.) A

review by this Court of the case at Bar would be nothing more than a rehearing of the same legal matters and a review of facts already decided in *Norwood* v. *Kirkpatrick*, supra. No new or important legal question has been advanced by Petitioner to support his claim for such review here.

Respondent, therefore, respectfully submits that the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

STROTHER HYNES,
Counsel for Respondent.
RAYMOND J. KUNKEL.
Other Counsel:

Dated: Richmond, Virginia
August 20, 1958